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No. 05-983

IN THE

Supreme Court of the United States

JACOB WINKELMAN, *et al.*,

Petitioners,

v.

PARMA CITY SCHOOL DISTRICT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals For The Sixth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

To what extent, if any, may a non-lawyer parent of a minor child with a disability proceed *pro se* in a federal court action brought pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*

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STATUTORY AND CONSTITUTIONAL PROVISIONS

1. Petitioners' appendix to their brief omits several of the salient provisions of the Individuals with Disabilities Education Act, 20 U.S.C. § 1400, *et seq.*,[1] and therefore Respondent adds additional provisions in an appendix to this brief.

2. Article I, section 8, clause 1 of the U.S. Constitution, which includes the Spending Clause, provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States." U.S. CONST., Art. I, § 8, cl. 1.

STATEMENT

Respondent is the second-largest school district in the Greater Cleveland area. It serves almost 13,000 students, nearly 2,200 of whom receive some form of special education services. Because Respondent provides such a wide range of special education services, it employs a full-time director of special education and three special education supervisors who oversee these programs. Respondent also provides services to disabled toddlers and infants under Subchapter III of IDEA (20 U.S.C. § 1431, *et seq.*) in order to better enable such children to prepare for elementary education.

Respondent develops, in collaboration with parents, individualized education programs (IEP) for each child who receives special education and related services under the IDEA. The IEP sets forth the child's present levels of performance, educational needs, and measurable goals, objectives and services that are designed to "meet the child's needs . . . to

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[1] The Individuals with Disabilities Education Act was recently reauthorized as the Individuals with Disabilities Education Improvement Act of 2004, Public L. No. 108-446, 118 Stat. 2647, and the current statute will be referenced as "IDEA" throughout this Brief. Respondent acknowledges that the current version of the statute applies to the question presented here.

enable the child to be involved in and make progress in the general education curriculum." 20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa). These services are provided "[t]o the maximum extent . . . with children who are not disabled" in accordance with IDEA's mandate of placement in the least restrictive environment. 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.115(a) (describing the continuum of alternative placements).

Jacob Winkelman is a nine year-old autistic child who has received or been offered special education and related services under the auspices of IEPs created by Respondent, in collaboration with Jacob's parents, since he was three years-old. JA at 31. During the 2000-01 school year, Jacob attended Respondent's First Step Preschool. When it became apparent that Jacob was not progressing satisfactorily at First Step, Respondent placed him at the Achievement Centers for Children preschool, a separate facility that specializes in educating students with autism and teaching skills students need to return to a less restrictive school setting with non-disabled peers. JA at 32. Jacob attended Achievement Centers for the 2001-02 and 2002-03 school years and enjoyed success in the program. JA at 32-34, 71.

In preparation for Jacob's transition to kindergarten, teachers from Respondent's Pleasant Valley Elementary School visited Achievement Centers' program, observed Jacob, and met with his teachers. The elementary school teachers learned that Jacob's greatest area of need was developing social skills and learning to interact appropriately with his peers. JA at 34, 54-56. Based on this information, along with more formal assessments, Respondent developed a draft IEP for Jacob. The draft IEP, which was discussed with the IEP team, outlined Jacob's present levels of performance and set forth goals, objectives and services designed to provide him with an educational benefit. JA at 36-37.

The IEP team, with the exception of Mr. and Mrs. Winkelman, agreed that Jacob's least restrictive environment was a special education resource room at Pleasant Valley staffed by a teacher and two educational assistants who taught six to eight children. JA at 37-38, 58-59. Jacob would receive one-on-one and small group instruction using the same methodologies that had proven successful at Achievement Centers. The IEP included speech and language therapy and an occupational therapy evaluation. Additionally, the proposed placement included opportunities for Jacob to socialize with both disabled and non-disabled peers. JA at 58-61.

Mr. and Mrs. Winkelman disputed the placement and requested that Jacob be placed at Monarch School, a private school that serves only children with autism. Monarch offered limited opportunities for socialization and no opportunities for interaction with non-disabled peers, as students typically work one-on-one in office sized rooms with a staff member. JA at 41. Respondent's IEP team members considered Monarch too restrictive because it would not afford Jacob the peer interaction necessary to meet his needs and further his development. JA at 63.

Based on the placement dispute, Mr. and Mrs. Winkelman submitted a due process complaint, which framed a single issue: whether Respondent's proposed program offered Jacob a free appropriate public education (FAPE) in his least restrictive environment. Resp. Br. at 1a. Petitioners' complaint did not allege that Mr. and Mrs. Winkelman had been denied a FAPE or any procedural violations. Petitioners requested that Jacob attend Monarch at Respondent's expense during the pendency of their due process proceedings. Upon the denial of this request, Petitioners nevertheless sent Jacob to Monarch at their expense for the 2003-04 school year.

A four day due process hearing, during which Petitioners were represented by counsel, followed in the wake of the due

process complaint. JA at 22. After reviewing the evidence, the hearing officer concluded that Respondent's proposed placement at Pleasant Valley offered Jacob a FAPE. JA at 78. Her decision compared the Achievement Centers' program, where Jacob experienced success, with the Pleasant Valley program, and concluded that the programs were "strikingly similar." JA at 106, 134. Given the similarities and other factors, the evidence demonstrated a great likelihood that Jacob would flourish at Pleasant Valley. JA at 90-93, 97.

The hearing officer found persuasive the testimony from numerous witnesses that Jacob needed to learn social skills and that Pleasant Valley would enable him to "be exposed to both disabled and nondisabled peers and would be afforded the opportunity to generalize his social and language skills across diverse environments." JA at 97. She also emphasized that "most importantly," Jacob's participation in the Pleasant Valley classroom would move him "one step closer to the ultimate goal of participation with regular education peers in school and other activities to the maximum extent appropriate." *Id.*

Dissatisfied with the decision, Petitioners, through counsel, filed an appeal with a state level review officer, who affirmed the impartial hearing officer's decision in its entirety. JA at 158. In comparing the programs, the state level review officer explained that Monarch was the "most restrictive environment employing almost all one-to-one instruction and very little group or peer interactions" while the Pleasant Valley classroom was "the most inclusive environment, employing both one-to-one and small group interaction along with the most opportunities for peer and other social interactions." JA at 134-35. In light of IDEA's least restrictive environment mandate, the state level review officer recognized: "Arguably, then, the arrangement at Monarch could even be characterized as regressive to Jacob's needs for improved and increased social interaction." JA at 135. "In fact, using a *de novo* standard, it

would be difficult to argue that the Monarch School is truly the 'best' or even appropriate placement for Jacob considering the overwhelming agreement among the witnesses for both parties that Jacob is both academically ready for kindergarten and socially ready for interactions with higher functioning peers." JA at 157.

Petitioners filed a *pro se* complaint before the U.S. District Court for the Northern District of Ohio, and initially sought an injunction to place Jacob at Monarch, at Respondent's expense, during the pendency of the proceedings. The district court denied the request for injunctive relief, finding that Jacob's stay-put placement was Pleasant Valley. Petitioners, *pro se*, took an interlocutory appeal to the Sixth Circuit, again requesting that Jacob be placed at Monarch. Prior to obtaining counsel, Petitioners filed "emergency" motions to stay the district court's decision despite neglecting to request a stay from the district court. The Sixth Circuit denied the "emergency" relief as procedurally improper and affirmed the district court's denial of injunctive relief.

Meanwhile, the district court proceeded to the merits of Petitioners' case – whether Respondent's IEP offered Jacob a FAPE – and Petitioners retained counsel to represent them before the district court. Utilizing a modified *de novo* standard, the court affirmed the decisions of the administrative officers in their entirety. Like the administrative officers, the district court emphasized the "overwhelming consensus that Jacob needs more peer interaction" in concluding that Respondent offered Jacob a FAPE. Pet. App. 21a. In the injunction appeal, the Sixth Circuit recognized that Petitioners "cannot tenably claim at this point that they have a likelihood of success on the merits (in view of the three merits decisions against them)." *Winkelman v. Parma City Sch. Dist.*, 166 Fed. Appx. 807, 811 (6th Cir. 2006).

Petitioners appealed the merits decision *pro se* to the Sixth Circuit. Based on a recent decision, the Sixth Circuit held that Mr. and Mrs. Winkelman could not represent Jacob *pro se*, nor could they pursue any individual IDEA claims. The Sixth Circuit ordered the Winkelmans to obtain counsel or face dismissal of the appeal. Pet. App. 1a-2a. Opting for a different course, Petitioners retained counsel to seek a stay from this Court and a writ of certiorari, both of which were granted.

As these proceedings have continued, during the 2004-05 school year, the Winkelmans elected not to send Jacob to school at all, notwithstanding decisions from two administrative levels concluding that he would succeed at Pleasant Valley. During the 2005-06 school year, Jacob again attended Monarch at Petitioners' expense. The current academic year finds Jacob again out of school, with his parents pursuing a host of other due process claims (separate from the claims forming the basis of this action). The Winkelmans are represented by counsel in these latest proceedings, two of which are presently on-going. In the midst of all of this litigation and acrimony, it is easy to forget that this case is really about Jacob – not his parents.

SUMMARY OF ARGUMENT

Petitioners offer this Court two paths to permit non-attorney parents to proceed *pro se* under the Individuals with Disabilities Education Act (IDEA), neither of which demonstrates fidelity to the statute. Jeff and Sandee Winkelman either want the right to represent their son, Jacob, *pro se* in federal court, or failing that, demand the ability to "represent" Jacob by seizing their own substantive rights under IDEA.

The plain language of IDEA does nothing to abrogate the common law ban on non-attorney parents representing their child in court. To the contrary, although IDEA permits parties in administrative hearings to proceed without counsel, Congress declined to grant such rights in the sections governing civil actions. This omission was hardly accidental, as Congress

recently considered and rejected an amendment to IDEA that would have permitted non-attorney parents to represent their child *pro se* in IDEA civil actions – the very right Petitioners ask this Court to create. Because this amendment concerns the precise issue before the Court and was rejected amidst widespread judicial renunciation of Petitioners' position, it confirms that Congress did not abrogate the common law rule.

Nor can congressional rejection of parental *pro se* representation be thwarted by casting an even broader net to secure independent parental substantive rights. Any such effort flies in the face of the statute's plain language, which creates a substantive right to a "free appropriate public education" to disabled children "between the ages of 3 and 21," and emphasizes "meet[ing] the child's needs" as the foundation of the statute. 20 U.S.C. § 1412(a)(1)(A), 1414(d)(1)(A)(i)(II)(aa), 1400(d)(1)(A). Every aspect of the statute, from the scope of permissible regulations to the individualized education program to dispute resolution, revolves around the interests of the child. By contrast, Congress limited parental rights to a narrow set of "procedural" safeguards. In fact, Congress envisioned that legal actions would be brought "on behalf of a child with a disability," *id.* at § 1411(e)(3)(E), during the child's minority and permitted States to transfer "all" parental procedural rights to a child who attained the age of majority. *Id.* at § 1415(m).

Petitioners brush by these details, preferring instead to place primary reliance on the "party aggrieved" phrase that describes who may bring a civil action. *Id.* at § 1415(i)(2)(A). Yet this ignores the threshold issue of whether parents have independent redressable rights. Congress situated the child as the only real party in interest in IDEA litigation. The procedural safeguards allowed to parents represent nothing more than a practical response to the consequence of the child's incapacity. Such utilitarian measures should not be mistaken as a conferral of substantive rights. Because parents lack their own enforceable

rights, the Court need not wrestle with the "party aggrieved" question, which contemplates, as Petitioners seem to agree, individuals who have actually suffered a violation of their own rights.

Petitioners' march down both paths not only collides with the plain language of the statute, but also transgresses the "clear notice" requirement for Spending Clause legislation. As this Court recently held, legislation passed pursuant to the Spending Clause requires Congress to spell out all conditions, obligations, and liabilities imposed upon the States in clear and unequivocal language. *See Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006). Petitioners seek to saddle the States with two new conditions untethered to the statutory text: either granting parents the full complement of substantive rights under the statute or allowing them to represent their child *pro se* in court. Such requirements fundamentally alter the statutory design by elevating parental rights and interests above those of their child. And they yield tangible consequences for school districts grappling with an unfunded mandate. The States never signed up for such a bargain. Indeed, the fact that six federal circuits rejected one or both of the proposed rules offered by Petitioners illustrates that Congress did not provide "clear notice" of these conditions to the States consistent with this Court's mandate in *Arlington*.

ARGUMENT

I. Non-Attorney Parents Cannot Represent Their Child *Pro Se* In Court Under IDEA

IDEA ensures that a "free appropriate public education" is available to all "children with disabilities." 20 U.S.C. § 1412(a)(1)(A). When disputes arise regarding whether a FAPE has been provided, Congress confined the scope of dispute resolution to addressing "the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *Id.* at §

1415(b)(6)(A). For that reason, Congress understood that any litigation would be "brought on behalf of a child with a disability to ensure a free appropriate public education for such child." *Id.* at § 1411(e)(3)(E).

Permitting actions to be brought on a child's behalf does not translate into allowing parents to represent their child *pro se* in federal court. No court has ever held that Congress abrogated the common law in IDEA in order to permit lay parents to represent their child *pro se*. Nor is such a right found in the statute's plain language. Far from overriding the common law, Congress specifically recognized the common law rule and precedent rejecting parents' attempts to represent their child *pro se* before discarding legislation that would have altered those results.

A. The Common Law Prohibits Lay Parents from Representing Their Child in Court

1. The rule that a non-attorney parent "may not represent another person in court is a venerable common law rule." *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998) (citations omitted). It is a "well-settled presumption" that "Congress understands the state of existing law when it legislates." *Bowen v. Massachusetts*, 487 U.S. 879, 896 (1988); *see also Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). In fact, "courts may take it as a given that Congress has legislated with an expectation that the [common-law] principle will apply except 'when a statutory purpose to the contrary is evident.'" *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991).

This Court need not indulge in presumptions because Congress acknowledged the common law rule in a committee report when it reauthorized IDEA in 2004 shortly before rejecting an amendment that would have accomplished what Petitioners ask this Court to do: "Both Federal and State laws generally prevent a non-attorney parent from representing his or

her child in a court proceeding, as these laws provide that a person can only represent himself or herself, and not proceed on behalf of their minor child." S. Rep. No. 108-185 108th Cong., 1st Sess., at 41. Indeed, all circuits to address the question subscribe to this rule. *See e.g., O'Diah v. Volkswagen of Am., Inc.*, 91 Fed. Appx. 159, 160 (1st Cir. 2004); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990); *Osei-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876, 882 (3d Cir. 1991); *Myers v. Loudon County Pub. Schs*, 418 F.3d 395, 401 (4th Cir. 2005); *Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002); *Smith v. Smith*, 49 Fed. Appx. 618, 620 (7th Cir. 2002); *Johns v. County of San Diego*, 114 F.3d 874, 876-77 (9th Cir. 1997); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576, 578, 582 (11th Cir. 1997), *cert. denied*, 522 U.S. 1110 (1998).

The common law ban on lay parent representation comports with 28 U.S.C. § 1654, which provides that "the parties may plead and conduct *their own cases* personally or by counsel. . . ." (Emphasis added). The circuits have recognized that Section 1654 only addresses the right to represent oneself, and thus "does not speak to the issue" of whether parents can represent their child. *Devine*, 121 F.3d at 581; *Cheung*, 906 F.2d at 61.

2. The common law rule furthers several important policy objectives. *Pro se* representation carries with it risks that are not present when a party is represented by counsel. *McNeil v. United States*, 508 U.S. 106, 113 (1993) ("It is no doubt true that there are cases in which a litigant proceeding without counsel may make a fatal procedural error . . ."). When a competent adult chooses to proceed without counsel, the adult assumes the risk of mistakes associated with untrained representation. *Graham-Humphreys v. Memphis Brooks Museum of Art, Inc.*, 209 F. 3d 552, 561 (6th Cir. 2000) ("In particular, a willfully unrepresented plaintiff volitionally

assumes the risks and accepts the hazards, which accompany self representation."). However, the same does not hold true for a child. As the Second Circuit noted:

> The choice to appear *pro se* is not a true choice for minors who under state law, cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect . . . . It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys. Where they have claims that require adjudication, they are entitled to trained legal assistance so their rights may be fully protected.

Cheung, 906 F.2d at 61 (internal citations omitted); *see also Osei-Afriyie*, 937 F.2d at 882 ("Osei-Afriyie is a well-educated economist. He is not, however, a lawyer, and his lack of legal experience has nearly cost his children the chance ever to have any of their claims heard."); *Powell v. Alabama*, 287 U.S. 45, 69 (1932) ("Even the intelligent and educated layman has small and sometimes no skill in the science of law. . . . If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect.").

This case amply illustrates the point. In the interlocutory appeal, the Sixth Circuit specifically found that a key argument framed by counsel subsequently retained by Petitioners (asserting that Jacob's stay-put placement should have been at Monarch) was never raised below when Petitioners proceeded without counsel: "The problem with this argument is that the Winkelmans never presented it to the district court. . . ." *Winkelman*, 166 Fed. Appx. at 810. Aside from that point, Petitioners could advance "no other tenable arguments for reversing the district court's decision. . . ." *Id.* at 811. As a result, their lawyer's subsequent perceptiveness could not erase

the damage that the Winkelmans caused to Jacob's case while proceeding *pro se*.

Having the foresight to make appropriate legal arguments is not the only benefit attorneys bring to the process. Attorneys inject a measure of objectivity often lacking in an area punctuated by emotion. Appreciating this fact, the Fourth Circuit refused an award of fees under IDEA to an attorney parent because "children deserve independent legal services" in order to ensure that "'reason rather than emotion' will dictate the conduct of the litigation." *Doe v. Board of Educ. of Baltimore Cty.*, 165 F.3d 260, 263-64 (4th Cir. 1998), *cert. denied*, 526 U.S. 1159 (1999); *see also Ford v. Long Beach Unified Sch. Dist.*, 461 F.3d 1087, 1091 (9th Cir. 2006); *S.N. v. Pittsford Cent. Sch. Dist*, 448 F.3d 601, 603 (2d Cir. 2006); *Woodside v. School Dist. of Philadelphia Bd. of Educ.*, 248 F.3d 129, 130 (3d Cir. 2001). When emotion rather than reason prevails, it inflicts harm on both the parties and the court.

3. The common law rule also reflects deference to the States' interest in regulating the practice of law. The Third Circuit emphasized this state interest, explaining that "there is a strong state interest in regulating the practice of law." *Collinsgru*, 161 F.3d at 231. The Sixth Circuit echoed these concerns: "We also note that this conclusion comports with principles of federalism insofar as allowing non-lawyers to represent IDEA plaintiffs would undermine the States' strong interest in regulating the practice of law." *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753, 756 (6th Cir. 2005). This interest is designed to protect all parties to litigation: "Requiring a minimum level of competence protects not only the party that is being represented but also his or her adversaries and the courts from poorly drafted, inarticulate, or vexatious claims." *Collinsgru*, 161 F.3d at 231. Congress should not be held to have intruded on such an important state interest unwittingly.

B. Congress Did Not Abrogate the Common Law Rule

As this Court has recognized, "in order to abrogate a common-law principle, the statute must '*speak directly*' to the question addressed by the common law." *United States v. Texas*, 507 U.S. 529, 534 (1993) (emphasis added).[2] This Court applied a similar analysis in *Schaffer* when assessing whether Congress had altered the background default rule on the burden of persuasion. *See Schaffer v. Weast*, 126 S. Ct. 528, 534-35 (2005). Moreover, a "party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change." *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989). Petitioners do nothing to overcome their burden here.

1. IDEA says nothing about the right of parents to proceed *pro se* in federal court. *See Cavanaugh*, 409 F.3d at 756 ("The Cavanaughs can point to no language in the IDEA that abrogates the common law rule that non-lawyers may not represent litigants in court."). Such silence falls well short of "speaking directly" to this issue. *See Texas*, 507 U.S. at 534; *Schaffer*, 126 S. Ct. at 534-36.

In administrative proceedings under the IDEA, Congress expressly allowed non-attorneys to prosecute and defend due process hearings. *See* 20 U.S.C. § 1415(h). By allocating some such rights in the administrative setting, it is difficult to imagine that Congress meant to instill greater rights in federal proceedings through its silence on this issue. Congress' specific inclusion of the right to lay representation in IDEA administrative hearings and appeals, combined with its exclusion of this right from the provision governing civil actions, *id.* at § 1415(i), provides compelling evidence of a

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[2] This standard parallels the "clear statement" rule mandated by the Spending Clause, as described below. Under either analysis, Petitioners bear the burden of demonstrating clear language in the statute that would permit parents to represent their child *pro se* in federal court.

deliberate omission and a quintessential opportunity for the application of the canon of *expressio unius est exclusio alterius*. *See Russello v. United States*, 464 U.S. 23 (1983) (holding that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion").

This Court has recently explained that *expressio unius* "has force" when the items addressed "are members of an 'associated group or series,' justifying the inference that items not mentioned were excluded by deliberate choice, not inadvertence." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 168 (2003) (*quoting United States v. Vonn*, 535 U.S. 55, 65 (2002)). Here, the canon carries particular force when applied to the series of IDEA enforcement mechanisms – administrative due process hearings, administrative appeals, and civil actions.

2. Lacking any clear language to abrogate the common law rule, Petitioners seek to carve a novel exception to it. Pet. Br. at 37-43. They suggest that because some courts permit non-attorneys to prosecute Social Security Income (SSI) appeals, this Court should embrace a similar exception for IDEA cases. Yet their analogy to SSI cases falls apart upon a glance at their key case, *Maldonado v. Apfel*, 55 F. Supp. 2d 296 (S.D.N.Y. 1999), which specifically distinguished SSI cases from IDEA matters: "IDEA claims and SSI claims are sufficiently dissimilar to justify a different result." *Id.* at 304. IDEA proceedings "are considerably more involved than the review of an administrative record in SSI appeals," and implicate a much more nuanced question than whether benefits are owing: not "whether the child has the right to an education, but rather the *type* of education to which the child is entitled." *Id.* at 304 & n.10 (emphasis added).

When a non-attorney represents a party in SSI cases, the regulations require the court to ensure that the non-attorney

"meets basic standards of competence," and to "continually assess" whether counsel should be appointed. *See Machadio v. Apfel*, 276 F.3d 103, 107-08 (2d Cir. 2002) (*citing* 20 C.F.R. § 416.1505). Similar safeguards do not exist under IDEA or its regulations, nor do Petitioners appear to urge the fact-intensive SSI inquiry. Rather, they seem to prefer a blanket rule authorizing parents to represent their child in all IDEA actions. Consistent with the very authority featured by Petitioners, this Court should decline to fashion such a rule.

C. Congress Recently Considered and Rejected Inclusion of Clear Language in IDEA Permitting Parents to Represent Their Child *Pro Se*

Congress's recent rejection of a new provision that would have given non-attorney parents the right to represent their children in court confirms its intent to adhere to the common law rule. Although the Senate passed such a provision, it was specifically rejected in the House-Senate conference committee and never enacted into law.

1. In 2003, Congress reviewed the IDEA and considered various amendments as part of the reauthorization process. *See generally* S. Rep. No. 108-185 108th Cong., 1st Sess. (2003). The Senate included a new parent *pro se* provision in its IDEA bill that addressed the very issue framed by Petitioners: "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004).

The Senate committee that originally adopted the parent *pro se* provision highlighted the basic common law rule that parents cannot represent their children *pro se*. *See, e.g.*, S. Rep. No. 108-185 108th Cong., 1st Sess., at 41. The committee also appreciated the circuit split: "The committee is aware of the current conflict between a number of federal circuit courts regarding this issue, and understands that some courts have

decided this issue based upon a distinction between procedural and substantive claims brought by a parent." *Id.* Indeed, the First Circuit was the only circuit to recognize a substantive right of parents under IDEA; thus, it stands to reason that the committee understood that most courts would not permit such action. Despite this knowledge, Congress passed the version of the statute that specifically omitted the Senate's *pro se* parent authorization. Council Br. at 6-9.

2. Although Petitioners discount the significance of Congress's rejection of the Senate proposal, as this Court recently explained: "To be sure, we have sometimes relied on congressional acquiescence when there is evidence that Congress considered and rejected the 'precise issue' presented before the Court. . . ." *Rapanos v. United States*, 126 S. Ct. 2208, 2231 (2006) (*quoting Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983)); *see also Bob Jones Univ.*, 461 U.S. at 601 ("Nonaction by Congress is not often a useful guide, but the nonaction here is significant."). Here, the "precise issue" before this Court – whether non-attorney parents should have the right to represent their child in IDEA civil actions – was considered by Congress. The fact that Congress rejected this language in the reauthorized IDEA is a testament to its intent to uphold the common law rule.

Because Congress rejected this approach in line with the weight of judicial authority, S. Rep. No. 108-185 108th Cong., 1st Sess., at 41, Petitioners' point that "several equally tenable inferences may be drawn from such inaction," *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990), fails to resonate. If Congress truly intended to confer substantive rights to parents or to allow them to represent their child, the judicial denunciation of these positions should have galvanized it into action. At a minimum, it cannot be said that Congress labored under the misperception that the statute provided parents with such rights in the face of the caselaw it referenced.

3. The failed Senate amendment also provides a stark contrast with the present language in the statute by demonstrating what would be necessary to "speak directly" to the question presented. In order to abrogate the common law or impose obligations on the States under the Spending Clause, Congress must speak clearly and with precision. It did just that in the proposed amendment that would have been Section 1415(i)(2) had it not been rejected by the House-Senate conference committee. Its failure to do so in the statute actually enacted, therefore, must be given due consideration by this Court. *Cf. Dellmuth v. Muth*, 491 U.S. 223, 229 (1989) ("[W]e note that a comparison of the language in the amendments with the language of the EHA serves only to underscore the difference in the two statutes, and the absence of any clear statement of abrogation in the EHA."); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) ("When Congress intended to impose conditions on the grant of federal funds. . . it proved capable of doing so in clear terms.").

D. Children's Rights Are Protected Both by Congress and the Federal Rules

Congress did not need to abrogate the common law rule because it took other steps to protect the child's rights, and existing procedural rules ensure a threshold level of protection. In IDEA, Congress permitted an award of attorney's fees in order to encourage the participation of counsel. *See* 20 U.S.C. § 1415(i)(3)(B); *Doe*, 165 F.3d at 264 (IDEA permits attorneys' fees because "children deserve independent legal services"). Congress also permitted grants to "parent organizations," which would, among other things, provide guidance to parents involved in disputes under IDEA. 20 U.S.C. § 1471. Local education agencies also "must inform the parent of any free or low-cost legal and other relevant services available in the area. . ." 34 C.F.R. § 300.507(b).

Children may also avail themselves of FED. R. CIV. P. 17(c), which provides that "whenever an infant or incompetent person has a representative, such as a general guardian . . . the representative may sue or defend on behalf of the infant or incompetent person." FED. R. CIV. P. 17(c). As numerous courts have concluded, this rule allows the guardian to sue on the incompetent person's behalf, but it does not permit a non-attorney guardian to represent the child in court. *See Johns*, 114 F.3d at 876-77; *Devine*, 121 F.3d at 581-82; *Osei-Afrivie*, 937 F.2d at 882; *Cheung*, 906 F.2d at 59; *Meeker*, 782 F.2d at 154; *see also* SG Br. at 10-11 n.3 (where parents "sue solely as representatives of their children under Rule 17(c), the parents are not 'parties' who are 'conduct[ing] their own cases' for purposes of 28 U.S.C. 1654, and they may not represent other individuals, including their children, in court"). Moreover, Rule 17(c) directs courts to take necessary actions to protect the interests of minors: "The court shall appoint a guardian ad litem for an infant or incompetent person not otherwise represented in an action or *shall make such other order as it deems proper for the protection of the infant or incompetent person.*" FED. R. CIV. P. 17(c) (emphasis added).

The Second Circuit illustrated the protections of Rule 17(c) in an IDEA context, attributing error to the district court for failing to consider the need for the appointment of counsel for the child. *See Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123, 125 (2d Cir. 1998), *cert. denied*, 526 U.S. 1025 (1999) ("The court has a duty to enforce the *Cheung* rule *sua sponte*, for 'the infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him.'"). It accordingly remanded with instructions to evaluate the child's need for counsel and, as part of its determination, to take into account his inability to proceed unless counsel was appointed. *Id.* Courts have thus exhibited the flexibility and practicality

that one would expect in applying this rule to protect the rights of minors.

Petitioners and their *amici* argue that if children cannot be represented by their parents, school districts will be able to obtain default judgments by appealing adverse administrative determinations to court. The Federal Rules of Civil Procedure operate to prevent exactly that scenario. FED. R. CIV. P. 55(b), working in tandem with Rule 17(c), does not allow default judgments to be taken against infants or incompetents unless a representative has appeared on their behalf. Thus, courts play an important role in protecting the interests of minors in accordance with Rules 55 and 17(c), confirming that the dire predictions of default judgments ring hollow.

II. Congress Provided Substantive Rights to Children With Disabilities and Did Not Grant Their Parents Judicially Enforceable Rights

Unable to find any language abrogating the common law ban on *pro se* parental representation, Petitioners offer a fall-back argument that sweeps even more broadly, claiming that they possess independently redressable rights. Yet this approach is nothing more than an attempt to recast the first argument. Petitioners' vision of "ensuring" the provision of a FAPE, Pet. Br. at 30, essentially means that they can represent their child in court, which, as demonstrated above, they cannot do. Smuggling this argument in through the guise of "substantive rights" requires Petitioners to knit together various provisions pulled from the crevices of the statute to create their "substantive" right. Employing such methods is a hazardous exercise, as explained by Justice Frankfurter: "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendos of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere

rendering becomes creation and attempted interpretation of legislation becomes legislation itself." *Palmer v. Massachusetts*, 308 U.S. 79, 83 (1939).

A. The Purpose of the IDEA is to Provide Children with Disabilities a Free Appropriate Public Education

IDEA reflects a congressional focus on the substantive rights of children with disabilities. *See, e.g., Board of Educ. of Comm. Consolidated Sch. Dist. v. Illinois State Bd. of Educ.*, 938 F.2d 712, 717 (7th Cir. 1991) (recognizing that the "EHA makes clear" that children's interests, not parents', "must be paramount"). The opening section emphasizes the "national policy" of "[i]mproving educational results for children with disabilities," 20 U.S.C. § 1400(c)(1), a purpose long recognized by this Court. *See, e.g., Arlington*, 126 S. Ct. at 2465 (Ginsburg, J., concurring) (describing the "overarching goal" of IDEA as "to provide a 'free appropriate public education' *to children with disabilities*") (emphasis added); *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 192 (1982) ("By passing the Act, Congress sought primarily to make public education available to handicapped children.").

Petitioners cannot escape the fact that when they submitted the due process complaint in this matter, they requested Respondent "provide a free, appropriate, public education for my child, Jacob Winkelman, who has a disability." Resp. Br. at 1a. That sentence encapsulates what IDEA is about – protecting the substantive rights of children and tailoring their education to best promote their needs. As the Fourth Circuit explained, "[p]lainly the focus of the IDEA is the educational needs of the child, not the parents. State officials are charged with formulation of an individualized education plan for the child, not the parents. The adequacy of such a plan is determined by how appropriately it meets the needs of the child, not the parents." *Doe*, 165 F.3d at 262. Undeterred, Petitioners

request that this Court extend the right to a FAPE to them. Pet. Br. at 30-31.

1. The heart of the statute and the true substantive right it creates is that a free appropriate public education must be available to "children with disabilities" who are "between the ages of 3 and 21." 20 U.S.C. § 1412(a)(1)(A). The statute frequently invokes the "right of a child with a disability" to receive a free appropriate public education. *See, e.g.*, 20 U.S.C. § 1408(a)(2)(C)(i); 1411(e)(3)(F)(i), 1412(a)(1)(A); 1415(b)(6). And when Congress spoke of the "obligation" to make a FAPE available and "provid[ing]" a FAPE, it kept the focus on "children with disabilities" alone. *See, e.g.*, 20 U.S.C. § 1412(a)(1)(B) ("[t]he obligation to make a free appropriate public education available to all children with disabilities"); § 1412(a)(5)(B)(i) ("provide a child with a disability a free appropriate public education"); § 1412(a)(10)(C)(ii) ("made a free appropriate public education available to the child"); § 1412(a)(11)(B) ("a free appropriate public education for any child with a disability"); § 1412(a)(12)(A)(i) ("to ensure a free appropriate public education to children with disabilities"); § 1414(a)(1)(D)(i)(II) ("making a free appropriate public education available to a child with a disability"). Petitioners ask this Court to rewrite the statute to mandate that a FAPE be made available to "children with disabilities *and their parents.*"

Congress, however, declined to include such language. Instead, the statute focuses on the child and the steps necessary to provide a FAPE, emphasizing the need to protect children's interests. For example, to effectuate IDEA's purpose of "ensur[ing] that all children with disabilities have available to them a free appropriate public education," 20 U.S.C. § 1400(d)(1)(A), states are charged with locating children with disabilities by adopting procedures that ensure that "all *children with disabilities* . . . who are in need of special education and related services, are identified, located, and evaluated." 34 C.F.R. § 300.111(a)(i) (emphasis added); 20 U.S.C. §

1412(a)(3). A child suspected of having a disability is entitled to an evaluation that determines whether he is a "child with a disability" as defined by the IDEA and that assesses his educational needs. 34 C.F.R. §§ 300.301, 300.306; 20 U.S.C. § 1414(a), (b).

Any "child with a disability" as defined by IDEA who "needs special education and related services" is entitled to a FAPE. 34 C.F.R. § 300.306(c)(2); 20 U.S.C. § 1414(d). The IEP sits as the cornerstone for the provision of a FAPE. It details the child's present levels of performance, educational needs, educational goals and objectives, and the special education and related services that will be provided to meet the child's needs. 34 C.F.R. § 300.320; 20 U.S.C. § 1414(d). The child's "IEP Team," as defined by 20 U.S.C. § 1414(d)(1)(B), must formulate an educational plan for the child that furthers the child's needs. *Id.* at § 1414(d)(1)(A)(i)(II).

2. Federal and state oversight of IDEA compliance predictably focuses upon "improving educational results and functional outcomes for all children with disabilities. . . ." *Id.* at § 1416(a)(2)(A). For that reason, Congress took care to restrain the ability of regulators to infringe on children's rights: IDEA explains that the Secretary of Education may not implement any regulation that "procedurally or *substantively* lessens the protections provided to children with disabilities under this chapter. . . except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation." 20 U.S.C. § 1406(b)(2) (emphasis added). Importantly, this provision, which limits the Secretary's authority regarding regulations, says nothing about any substantive rights possessed by parents. The same holds true for the section regarding state administration. State regulations and policies must help "enable children with disabilities to meet the challenging State student academic achievement standards." 20 U.S.C. § 1407(b). And States receive grants for the purpose of

"provid[ing] special education and related services to children with disabilities. . . ." 20 U.S.C. § 1411(a)(1).

3. The entire framework of dispute resolution under IDEA likewise revolves around the child's rights. In order to initiate an impartial due process hearing, a complaint must be filed in accordance with Section 1415(b)(6)(A). *See* 20 U.S.C. § 1415(f)(1)(A).[3]

Subsection (b)(6)(A) demarcates the permissible boundaries of an IDEA complaint. A complaint may be initiated "with respect to any matter relating to the identification, evaluation, or educational placement *of the child*, or the provision of a free appropriate public education *to such child*," and must include, among other things, "a description of the nature of the *problem of the child* relating to such proposed initiation or change. . . ." 20 U.S.C. § 1415(b)(6)(A) (emphasis added)[4]; § 1415(b)(7)(A)(ii)(III) (emphasis added). IDEA civil actions are likewise limited to adjudicating matters "with respect to the complaint presented pursuant to this section. . . ." *Id.* at § 1415(i)(2)(A); *see also* Pet. Br. at 35 ("Congress necessarily contemplated that the complaint would frame the universe of claims eligible for any . . . judicial review under § 1415(i)(2)(A).").

At the due process hearing, the hearing officer's decision must "be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* at § 1415(f)(3)(E)(i). This further illustrates IDEA's emphasis on the substantive rights of

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[3] That provision also references a complaint under Section 1415(k), which pertains to a child who violates a code of student conduct. The action in the present case was initiated pursuant to subsection (b)(6)(A), rather than subsection (k).

[4] The limits placed by subsection (b)(6)(A) contrast with, for example, the scope of the right to mediation. *See* 20 U.S.C. § 1415(e). Under those provisions, "disputes involving any matter" can be resolved through mediation. *Id.* at § 1415(e)(1).

children with disabilities. Indeed, the ensuing subsection on procedural violations explains that only certain procedural violations can rise to the level that would cause a hearing officer to "find that a child did not receive a free appropriate public education. . . ." *Id.* at § 1415(f)(3)(E)(ii).

Every aspect of dispute resolution hinges on the child's substantive right to a FAPE, rather than any notion of parental rights. Petitioners recognized the intent of the statute when they tailored their complaint in this matter to redressing harm to Jacob rather than seeking relief for a violation of parental "rights." Petitioners' due process complaint opened by requesting a hearing to "challenge the Parma City School [D]istrict . . . to provide a free, appropriate, public education *for my child, Jacob Winkelman*, who has a disability." Resp. Br. at 1a (emphasis added). The complaint went on to allege that Parma lacked a suitable program that provided "the needed intervention and support for *my child, Jacob Winkelman*. . . I feel the school is not providing *my child with a free, appropriate, public education*." *Id.* (emphasis added). Nowhere in this complaint did Mr. and Mrs. Winkelman assert their own right to a FAPE – the very right they implore this Court to create.

After the impartial hearing officer ruled that Respondent had offered a FAPE "to the child," JA at 111, Petitioners sought review at the state level. That proceeding was captioned: "In the Matter of Jacob Winkelman, Student" and referred to Jacob as "Petitioner/Appellant." JA at 114. Jacob's parents are not mentioned in the caption of the appeal. Such a caption illustrates, at a minimum, that the state-appointed hearing officers who apply this statute on a daily basis understand that IDEA is for the benefit of the child. Even more importantly, the administrative decisions focus exclusively on Jacob's interests and needs, not those of his parents. JA at 21-158.

Before this Court, however, Petitioners obscure the impact of Section 1415(b)(6)(A) by portraying it as placing "no limit on the bundle of claims that a party may bring." Pet. Br. at 35. Yet it certainly confines the scope of available claims to those related to the child's identification, evaluation, placement, or the provision of a FAPE, and limits relief to situations in which the child has been denied a FAPE. Congress's decision not to include any reference to parental rights in this provision must be respected.

Section 1411(e)(3)(E) also reflects Congress's desire to limit due process proceedings to claims involving a child's substantive rights. In that provision regarding legal fees, Congress provides that certain of its funding "shall not support legal fees, court costs, or other costs associated with a cause of action brought *on behalf of a child with a disability* to ensure a free appropriate public education for such child." (Emphasis added). Consistent with Section 1415(b)(6)(A), the emphasized language confirms that any action brought to secure a FAPE must be initiated on the child's behalf.

B. Parental Safeguards Under IDEA Are Collateral, Not Independent Substantive Rights

By granting children the substantive right to a FAPE, Congress made them the real party in interest in IDEA litigation. Parents, by contrast, received collateral tools related to the child's underlying substantive rights – not freestanding or independently enforceable rights. *See, e.g., Cavanaugh*, 409 F.3d at 757 ("[T]hese procedural rights exist only to ensure that the child's substantive right to a FAPE is protected and do not confer on the parents a vicarious, substantive right to a FAPE."). IDEA ensures the availability of a FAPE to children with disabilities – everything else is ancillary.

1. Congress's decision to limit the rights available to parents is sensible, particularly in light of IDEA's expansive

definition of "parent." *See* 20 U.S.C. § 1401(23). It includes not only natural parents (such as Mr. and Mrs. Winkelman), but also foster parents, guardians, any individual acting in the place of parents with whom the child lives (as IDEA explains, "including a grandparent, stepparent, or other relative"), an individual "who is legally responsible for the child's welfare," and a surrogate parent.[5] *Id.* Given this expansive definition, as well as the potential for the child's "parent" to change from time to time, one can appreciate congressional reluctance to instill "parents" with substantive rights. The members of Congress submitting an *amicus* brief illustrate the confusion attendant with extending independent rights to parents. They assert that certain "parents" have the right to pursue substantive claims on their own behalf, but that children who have "legal guardians or foster parents" would have to avail themselves of FED. R. CIV. P. 17(c). Cong. Br. at 19 n.6. Therefore, despite the broad definition of "parents" contained in the statute, the rule espoused by Petitioners would apparently only benefit certain categories of "parents" but not others. Such line-drawing will ensure that school districts become mired in the middle of family disputes. *See* NSBA Br. at 16-17.

2. Section 1415(m) of IDEA also compels the conclusion that parental rights are both derivative and transitory. Under this section, States may provide that, upon the attainment of the child's majority, "all other rights accorded to parents under this subchapter transfer to the child,"[6] 20 U.S.C. § 1415(m)(1)(B), and that "the agency shall notify the individual and the parents of the transfer of rights."[7] *Id.* at § 1415 (m)(1)(C). If Congress

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[5] Surrogate parents are individuals appointed by the local educational agency who meet certain qualifications and who are paid by the agency. *See* 34 C.F.R. § 300.519.

[6] "Subchapter" refers to "Subchapter II" of IDEA, which encompasses 20 U.S.C. § 1411 through § 1419 (and thus virtually every statutory provision featured by Petitioners).

[7] A child may receive services under IDEA until reaching the age of 22. *See,*

desired to confer independent substantive rights upon parents, one would not imagine that it would so readily strip them of these rights. Instead, Section 1415(m) illustrates that Congress appreciated the practical reality that children lack capacity to consummate certain transactions: "Though parents have some rights under the IDEA, the child, not the parents, is the real party in interest in any IDEA proceeding. The references to parents are best understood as accommodations to the fact of the child's incapacity. That incapacity does not collapse the identity of the child into that of his parents." *Doe*, 165 F.3d at 263. In other words, once the impediment of incapacity is removed, the child no longer needs the parent to assist in exercising his rights.

The First Circuit in *Maroni* utilized Section 1415(m) as part of the underpinning for its decision that parents enjoy substantive rights under IDEA. *Maroni v. Pemi-Baker Reg'l Sch.*, 346 F.3d 247, 251 (1st Cir. 2003). Perhaps the reason *Maroni* stands alone as the only circuit case to reach such a result stems from its flawed premise. The court described Section 1415(m) as "permit[ting] *parents* to transfer this right . . . to their child" who has attained the age of majority. *Id.* (emphasis added). Petitioners perpetuate the same error in their brief. Pet. Br. at 42. The statute, however, gives *States* the right to transfer parents' rights – it does not reserve that discretion to the parents, which causes much of the rationale of *Maroni* (and by extension, that of Petitioners) to unravel.

To illustrate, Ohio's regulations on this subject explain that the transfer is automatic: "At least one year before a student reaches the age of majority. . . the student shall be informed of his or her rights that *will transfer* to the student on reaching the age of majority." OHIO ADMIN. CODE 3301-51-05(J)(1)

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e.g., 20 U.S.C. § 1412(a)(1)(A). Thus, it would be illogical to provide a parent with a joint substantive right to a FAPE until the child turned 18 only to remove this right during the child's last three years of services.

(emphasis added); *see also* 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(cc). It is the school district's obligation to "ensure that all rights accorded to parents. . . transfer to the student." OHIO ADMIN. CODE 3301-51-05(J)(2). In fact, the only way for a parent to halt the transfer is to initiate a judicial proceeding to have the child declared incompetent. *Id.* As this regulatory scheme attests, Section 1415(m) does not give parents the option of transferring their rights; it gives States the ability to require and effectuate such a transfer.

3. The dispute resolution mechanisms under IDEA underscore the conclusion that parents are not real parties in interest. As explained above, the purpose of an IDEA due process hearing (and any ensuing litigation) is to settle disagreements regarding a *child's* educational program, not to create a fountain of rights for parents. For that reason, the references to "parents" seized upon by Petitioners and their *amici* in the context of IDEA administrative proceedings, *see* 20 U.S.C. § 1415(b)(8), 1415(c)(2)(B), 1415(d)(2), 1415(o), Pet. Br. at 17-19, effectively treat the parent as the child's "next friend" akin to the procedures under FED. R. CIV. P. 17(c). *See, e.g.*, 20 U.S.C. § 1415(m), 1411(e)(3)(E), 1415(b)(6)(A). Allowing a parent to request a hearing regarding the child's right to a FAPE is a mechanism to ensure protection of the child's rights despite a lack of capacity. *See Emery v. Roanoke City Sch. Bd.*, 432 F.3d 294, 299 (4th Cir. 2005) (recognizing that a parent's procedural rights "stem solely from their disabled child's inability to pursue a remedy due to his incapacity"); *Doe*, 165 F.3d at 263; *Cavanaugh*, 409 F.3d at 757 ("[T]he intended beneficiary of the IDEA is not the parents of the individual with a disability, but the disabled individual.") (citation omitted).

The Solicitor General suggests that there is no "practical reason" why Congress would permit parents to proceed *pro se* in administrative proceedings but not in federal court. SG Br.

at 14; *see also* Pet. Br. at 18 n.13. Yet the administrative proceedings are, by nature, designed to be a less formal and more expedient method of dispute resolution. *See Schaffer*, 126 S. Ct. at 536 ("IDEA hearings are deliberately informal. . . ."). Once the matter arrives in court, as the record in this case attests, IDEA and procedural rules will present a maze of requirements that *pro se* litigants will often have trouble navigating. *See Collinsgru*, 161 F.3d at 236. Congress was certainly entitled to conclude that parents should not proceed *pro se* in court to enforce their child's substantive rights under IDEA, which may explain why it allowed for attorneys' fees to entice the participation of counsel. *See Arlington*, 126 S. Ct. at 2461 (recognizing that there may be "many reasons why Congress" structured IDEA as it did).

Contrary to Petitioners' view, the congressional choice to permit attorneys' fees cannot be twisted into a basis for guaranteeing parents the right to proceed *without counsel*.[8] *See, e.g.*, 20 U.S.C. § 1415(i)(3)(B)(i)(I) (attorneys' fees awardable "to a prevailing party who is the parent of a child with a disability"); § 1415(i)(3)(D) and (F). Rather, Congress provided for attorneys' fee awards to facilitate attorney involvement, not as a means for ensuring *pro se* litigation.

The attorneys' fee provisions confirm the derivative nature of parental safeguards (an award of fees, after all, depends on the predicate finding that the *child* was denied a FAPE) and further

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[8] Equally perplexing is Petitioners' reliance on provisions explaining that certain rights of action *are not* created by the statute in order to prove to the Court that they possess independently enforceable rights. *See* 20 U.S.C. § 1401(10)(E), § 1412(a)(14)(E) ("Notwithstanding any other individual right of action that a parent or student may maintain under this subchapter," certain actions cannot be maintained). By clarifying in these sections certain rights of action that could not be maintained, Congress should not be held to have inadvertently created other rights of action (particularly since Section 1401(10)(E) references rights of action under Subchapter I, which are nonexistent).

reflect Congress's appreciation of the practical reality that children lacked capacity to initiate their own lawsuits, which meant that others must act on behalf of the child. *See, e.g., Doe*, 165 F.3d at 263.[9] It is not necessary to divine congressional intent to reach this conclusion, because Congress expressly acknowledged that IDEA claims would be brought on behalf of children with disabilities. *See* 20 U.S.C. § 1411(e)(3)(E) (providing that certain funding "shall not support legal fees, court costs, or other costs associated with a cause of action brought *on behalf of a child with a disability* to ensure a free appropriate public education for such child") (emphasis added); *see also* 20 U.S.C. § 1415(b)(6)(A), (m). As this Court in *Schaffer* explained, the "party seeking relief" in that case "is Brian, as represented by his parents," who proceeded through counsel. *Schaffer*, 126 S. Ct. at 537; *see also* Resp. Br. at 1a; JA at 114.

Likewise, none of the provisions regarding reimbursement for tuition exist but for the *child's* underlying substantive right to a FAPE. *See* Pet. Br. at 32; 20 U.S.C. § 1412(a)(10). Although the statute speaks in terms of "reimburs[ing] the parents," it clarifies that the right to reimbursement is, at best, derivative because it only arises upon a finding "that the agency had not made a free appropriate public education available *to the child* in a timely manner" prior to the child's enrollment in a private school. *Id.* at § 1412(a)(10)(C)(ii) (emphasis added); *see also* § 1415(b)(6)(A); § 1415(f)(3)(E). Therefore, the child

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[9] The same reasoning applies with respect to settlement agreements, which Petitioners present as further proof that parents are the real parties in interest. Giving parents the right to execute a settlement agreement to resolve the impartial due process hearing, 20 U.S.C. § 1415(f)(1)(B)(iii), is nothing more than a recognition that a child, as a minor, could not execute a binding contract. Because the relief is directed towards the child, rather than the parent, as confirmed by 20 U.S.C. § 1415(b)(6)(A), such provisions about settlement agreements reinforce Respondent's position.

remains the real party in interest to any such action as any reimbursement is premised on his injury.[10]

This is particularly so because any claim for reimbursement flows from the parent's act of removing the child from a school that they believe is not providing a FAPE, which this Court has recognized is a risk assumed by the parents. *See School Comm. of the Town of Burlington, Mass. v. Department of Educ. of Mass.*, 471 U.S. 359, 373-74 (1985). The potentially divergent interests between a parent seeking pecuniary relief and a child who has been displaced from the public schools further highlights the need for objective counsel from an attorney. Unfortunately, this case bears out that concern, as Mr. and Mrs. Winkelman elected not to send Jacob to school at all during the 2004-05 school year in the hopes that an administrative officer or court would order him sent to private school. Their quest for pecuniary relief while they deny Jacob access to public schools highlights, at a minimum, the need for independent counsel standing up for his rights.

The fact parents may initiate a due process complaint and become involved in that process does not cloak them with real party in interest status under IDEA. *See Cavanaugh*, 409 F.3d at 757 ("[W]e hold that the right of [a] disabled child to a FAPE belongs to the child alone, and is not a right shared jointly with his parents."). Congress could have clarified that *parents* could seek certain relief under this provision for harm to themselves, but it declined to do so. *See* 20 U.S.C. § 1415(b)(6)(A); § 1411(e)(3)(E). Because Section 1415(b)(6)(A) confirms that due process complaints are limited to issues involving the child's identification, evaluation, placement, and the provision of a FAPE, references to a parent's role in the complaint

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[10] Petitioners' reading of the reimbursement provisions would yield absurd results, as it would bar recovery by a child when someone other than the "parent" paid for the tuition.

process are insufficient to supplant the child as the real party in interest.

C. Congress Described Parental Safeguards as "Procedural"

Congress did not grant parents broader substantive rights than the derivative procedural safeguards actually enumerated in the statute. Nevertheless, Petitioners insist that "parents also have a substantive right under IDEA to a free appropriate public education for their child," Pet. Br. at 31 (emphasis omitted), a point echoed by the Solicitor General: "parents share with their child the substantive right under the statute to a free appropriate public education." SG Br. at 7.

For good reason, Petitioners do not elaborate on how a parent's substantive right to a FAPE could be applied. Must school districts prepare an IEP that addresses the parent's needs (that may not align with the child's needs) or provide services designed to assist the parent in caring for the child? Petitioners' reading would confound school districts and the judiciary alike, as they would struggle to determine how to apply to parents a statute designed to enhance the educational opportunities of children.

Petitioners then vary the theme, asserting the substantive right to "ensur[e] that their child is receiving IDEA's statutorily-guaranteed FAPE." Pet. Br. at 30. This approach fares no better, as it simply recasts as "substantive" the safeguards that Congress deemed "procedural" in Section 1415. Transforming such procedural safeguards into independently enforceable substantive rights through a parsing of the statute is the precise ill against which this Court cautioned in *Palmer*. *See Palmer*, 308 U.S. at 83.

1. When Congress spoke about safeguards provided to parents under the statute, it generally classified them as "procedural." Indeed, as this Court has recognized under

IDEA's predecessor, "the EHA confers upon disabled students an enforceable *substantive right* to public education in participating States," whereas parents receive "various *procedural* safeguards." *Honig v. Doe*, 484 U.S. 305, 310-11 (1988) (emphasis added); *see also Mosely v. Board of Educ. of the City of Chicago*, 434 F.3d 527, 532 (7th Cir. 2006) ("Most of our sister circuits take the position that the IDEA thus confers different rights on children and parents: both substantive and procedural rights for the child, and procedural rights only for the parents.").

Section 1412(a)(6)(A) begins by explaining that "[c]hildren with disabilities and their parents are afforded the procedural safeguards required by section 1415." Similar phrases are echoed throughout the balance of Subchapter II. *See* 20 U.S.C. § 1415(a) (States must "ensure that children with disabilities and their parents are guaranteed procedural safeguards"); § 1415(b) ("[t]he procedures required by this section shall include. . ."); [11] § 1415(d)(1)(A). If parents enjoyed substantive rights, there would be no need to differentiate between procedural and substantive in the statute.

As the text of the statute reveals, Congress knew how to label certain rights as "substantive" when it so desired. Indeed, it did so elsewhere in the IDEA but only in reference to the child – not the parent. *See* 20 U.S.C. § 1406(b)(2); *see also* § 1415(f)(3)(E)(i). Its failure to describe the parental safeguards as "substantive" must be accorded significance, particularly when juxtaposed with its frequent use of the word "procedural."

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[11] Several of these rights enumerated in Section 1415 parallel rights under the Family Educational Rights and Privacy Act of 1974 (FERPA) that this Court recently found were not enforceable through a private right of action. *See Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002); *id.* at 293, 295 (Stevens, J., dissenting) (FERPA "includes 10 subsections, which create rights for both students and their parents, and describe the procedures for enforcing and protecting those rights. . . . [FERPA] is directed to the benefit of individual students and parents. . . .").

See, e.g., Arlington, 126 S. Ct. at 2460; *Collinsgru*, 161 F.3d at 227 ("We think, however, that Congress's decision to endow parents with these procedural rights should not be read, under the language of IDEA, to imply that parents also possess the same underlying substantive rights that their children possess.").

Other provisions of the statute validate the role of parent as custodian of procedural safeguards, despite Petitioners' efforts to transform these into substantive rights. Petitioners' reliance on the "participatory guarantees" discussed in *Schaffer* as the building blocks for the substantive right they seek to create reveals the precarious nature of the foundation. Pet. Br. at 34, *quoting Schaffer*, 126 S. Ct. at 532; *see also* SG Br. at 14-15. Respondent does not discount the role of a child's parent. As this Court remarked in *Schaffer*: "The core of the statute, however, is the cooperative process that it establishes between parents and schools. . . Parents and guardians play a significant role in the IEP process." *Schaffer*, 126 S. Ct. at 532; *see also Rowley*, 458 U.S. at 205-06. Yet these points must not be divorced from their context. Giving parents a seat at the table to help formulate the IEP, as referenced in *Schaffer*, is a far cry from imbuing them with the substantive right to a FAPE. The IEP team includes other individuals (such as teachers and school district administrators) who no one pretends possess substantive rights under IDEA. 20 U.S.C. § 1414(d)(1)(B).

The responsibility to develop an IEP lies with the school district – not the child's parent. 34 C.F.R. 300.323. While the parents are one voice on the team, they have no right to veto the IEP or dictate terms of the program. *See White v. Ascension Parish Sch. Bd.*, 343 F.3d 373, 380 (5th Cir. 2003) ("The right to provide meaningful input is simply not the right to dictate an outcome and obviously cannot be measured by such."); *Schaffer*, 126 S. Ct. at 532. Further, the "adequacy of [an IEP] is determined by how appropriately it meets the needs of the

child, not the parents." *Doe*, 165 F.3d at 262. In this case, for instance, Jacob's parents believed that he should be educated largely in a solitary one-on-one setting. JA 88-97. The educators on his IEP team, however, concluded that Jacob would benefit from greater interaction with his non-disabled peers based on reports from his preschool teacher and formal assessments. The team likewise recognized that Jacob's participation in a special education classroom might ultimately facilitate his assimilation into a traditional classroom setting. JA 96-97. Quite properly, Jacob's interests and needs – and not those of his parents – drove the decision to place Jacob at Pleasant Valley.

Petitioners' search for a substantive right goes well beyond IEP team participation, however, even relying upon references to children "and the families of such children" in the congressional findings set forth at 20 U.S.C. § 1400(c)(3) and a word count of the usage of "families." Pet. Br. at 3. This betrays both the breadth of their proposed rule and the lengths to which they must go to secure it. Hortatory phrases about "families" in the preamble do not provide a basis for substantive rights. *See, e.g.*, Norman J. Singer, *Sutherland Statutes & Statutory Construction*, § 20.3 (6th ed. 2002) ("The function of the preamble is to supply reasons and explanations and not to confer power or determine rights."). But if, in Petitioners' view, "families" serves as a predicate for the creation of rights, then surely it must pave the way for the extension of substantive rights to other family members (however that term might be defined). For example, siblings could suddenly seek relief under the statute, claiming that the denial of FAPE diverted familial resources. Congress did not intend such a perverse result as the statute attests, clarifying that the focus of IDEA remains upon making a FAPE available to "children with disabilities." 20 U.S.C. § 1412(a)(1)(A).

2. Throughout several revisions to the IDEA, one feature of the act has remained constant – the dichotomy between the child's substantive rights and the parent's procedural safeguards. Petitioners' attempts to blur that distinction are unavailing because IDEA, as a whole, confirms that Congress sought to protect children with disabilities and did not grant coterminous rights to their parents.

Nor are the procedural safeguards enforceable independent of the child's substantive right to a FAPE, as Congress recently clarified. *See, e.g., Diamond v. Michigan*, 431 F.3d 262, 266 (6th Cir. 2005) ("[B]efore a plaintiff is entitled to relief for procedural violation under IDEA, the court must determine that a state's procedural violation caused substantive harm."). Under IDEA as reauthorized in 2004, there are now two types of procedural violations - ones that prevent the "child [from] receiv[ing] a free appropriate public education," 20 U.S.C. § 1415(f)(3)(E)(ii), and those that do not affect the provision of a FAPE. *Id.* at § 1415(f)(3)(E)(iii). A hearing officer's decision, however, "shall be made on substantive grounds based on a determination of whether the child received a free appropriate public education." *Id.* at § 1415(f)(3)(E)(i). In other words, Congress declined to provide for relief for technical procedural violations, and ones serious enough to jeopardize the provision of a FAPE require the child, as the individual possessing the substantive right, to vindicate the right to a FAPE.

D. Parents Do Not Have Independent Redressable Rights Under IDEA to Pursue *Pro Se*

Petitioners build their "substantive right" edifice on "innuendos of disjointed bits of a statute." *Palmer*, 308 U.S. at 83. Nowhere is this more evident than with respect to Petitioners' treatment of "party aggrieved." Petitioners insist that they are "part[ies] aggrieved," capable of initiating their own action *pro se* in federal court pursuant to Section 1415(i)(2)(A).

As explained above, however, parents lack any substantive right under IDEA, and Congress did not permit their procedural safeguards to be independently enforceable. The "party aggrieved" language falls well short of vitiating congressional intent and overturning those twin conclusions.

Petitioners' myopic focus on "party aggrieved" language overlooks these points, as confirmed by their attention to the definition of "aggrieved" from *Black's Law Dictionary*, Pet. Br. at 17, rather than the term "aggrieved party" which appears right below it. *Black's* defines "aggrieved party" as: "A party *entitled to a remedy* . . . ." *Black's Law Dictionary* (8th ed. 2004; emphasis added). Petitioners thus ask the wrong question by focusing on "party aggrieved" because that depends on a predicate that parents have independent and redressable rights. As detailed above, however, every turn in the statute reveals congressional intent that only the child could seek relief for the lost educational opportunities accompanying the denial of a FAPE. *See Doe*, 165 F.3d at 262 ("[T]he child, not the parents, is the real party in interest in any IDEA proceeding."); *Ortega v. Bibb County Sch. Dist.*, 397 F.3d 1321, 1323 (11th Cir. 2005) ("[W]e agree with our sister circuits that the 'IDEA's primary purpose is to ensure [a FAPE], not to serve as a tort-like mechanism for compensating personal injury.'").[12]

To the extent that Petitioners seek substantive relief, they cannot invoke the "party aggrieved" language as a bootstrap for rights that otherwise do not exist under the statute. In fact, Petitioners acknowledge that a parent's rights must be "violated" before they can become "aggrieved" and "real parties in interest to any suit to vindicate those rights." Pet. Br. at 30.

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[12] Similarly, Petitioners miss the mark by suggesting that Respondent desires the "party aggrieved" language contained in Section 1415(g)(1) and Section 1415(i)(2)(A) to mean different things. Pet. Br. at 21-23. Parents are never the real party in interest in either the administrative proceeding or the judicial forum. They are instead pursuing matters on behalf of their child.

Therefore, they tacitly concede that a parent must possess substantive rights before seeking redress for a substantive violation. *Cf. Lujan v. National Wildlife Federation*, 497 U.S. 871, 883 (1990) (recognizing that a party's injury must be "*his* aggrievement, or the adverse effect *upon him*" (emphasis in original)). Petitioners seek to brush by this problem by pointing to *FEC v. Akins*, 524 U.S. 11, 19 (1998), in which this Court commented that "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly." Yet neither *Akins* nor other case law permits "party aggrieved" to be wielded as a vehicle for expanding substantive rights beyond those permitted in the underlying statute.

Nor can "party aggrieved" pave the way for judicial actions to enforce procedural rights (to the extent that Petitioners would invite such a result), for the reasons explained above. Procedural ills are not independently enforceable unless they deprive the substantive right to a FAPE, as IDEA confirms in Section 1415(f)(3)(E), which requires the holder of the substantive right to bring the claims. Tellingly, the parents here advanced neither their own substantive right to a FAPE nor did they allege any procedural violations in their due process complaint.[13] Resp. Br. at 1a. Thus, even if parents could in some circumstances constitute a "party aggrieved" for procedural violations, this case presents a poor vehicle for exploring the contours of such a rule because these parents raised no such claims in their due process complaint and have

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[13] Although Petitioners now allege "procedural" violations, Pet. Br. at 7, their assertion is both untimely and fails to present any cognizable procedural rights. Petitioners did not raise their "predetermination" claim until the case was before the district court, depriving it of jurisdiction on this point. Pet. App. at 10a. Similarly, Petitioners' claims regarding the hearing officer's use of a research assistant and her decision to grant extensions requested by both parties are not recognized in the procedural safeguards afforded by IDEA. 20 U.S.C. § 1415.

never asserted any such claims separate from the claimed denial of a FAPE to Jacob.

For the same reason that "party aggrieved" is irrelevant, Section 1654 of Title 28, which received considerable attention in the briefs of Petitioners and their *amici*, does not answer the threshold question of whether parents possess rights that they can seek to vindicate in federal court. IDEA determines, as described above, the extent of rights possessed by parents. Section 1654, which permits parties to "plead and conduct their own cases personally or by counsel," does not operate to expand the rights granted by IDEA, and Petitioners do not seriously contend otherwise. As described at length throughout this brief, IDEA did not bestow the antecedent rights that Petitioners must establish before reaching the question of Section 1654.

In the end, Petitioners are left to argue that "party aggrieved" must be given their reading in order to comport with the overarching purpose of IDEA. In *Arlington*, however, this Court cautioned against allowing a broad purpose to transcend the language actually employed by Congress: "These goals, however, are too general to provide much support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations." *Arlington*, 126 S. Ct. at 2463. Such policy-based arguments essentially draw into question the legislative choices made by Congress. Such matters, as the Solicitor General puts it, are "for Congress to decide." SG Br. at 28. The congressional *amici* implore this Court not to burden them with the time consuming and difficult task of amending IDEA. They have good reason to request this Court's intervention given their unsuccessful attempt to amend the statute to permit *pro se* parental representation just two years ago.

Justice Ginsburg captured the point in her concurrence in *Arlington* – even though certain policy objectives "would make good sense in light of IDEA's overarching goal," Congress must actually make the policy choice for itself. *Arlington*, 126 S. Ct. at 2465 (Ginsburg, J., concurring). As a result, "[t]he ball. . . is properly left in Congress' court" to spell out the requirements that will be binding upon the States. *Id.*; *see also Rowley*, 458 U.S. at 200 ("Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act.").

III. Petitioners' Proposed Rules Would Violate The "Clear Notice" Requirement of the Spending Clause

The plain language of IDEA, as explained above, answers both of the questions presented regarding parental *pro se* representation of their child and the creation of substantive rights. *See also Arlington*, 126 S. Ct. at 2464 (Ginsburg, J., concurring) ("[N]o 'clear notice' prop is needed in this case given the twin pillars on which the Court's judgment securely rests."). But there is an additional and independent reason compelling affirmance of the Sixth Circuit – Congress did not employ "clear notice" of the rights sought to be recognized by Petitioners consistent with the mandate of the Spending Clause, U.S. CONST., Art. I, § 8, cl. 1.

This Court has long recognized that the Spending Clause requires that Congress provide clear notice to the States before burdening them with additional conditions, obligations, or liabilities under IDEA and its predecessor statutes. *See, e.g., Arlington*, 126 S. Ct. at 2458-59; *Cedar Rapids Community Sch. Dist. v. Garret F.*, 526 U.S. 66, 84 (1999) (Thomas, J., dissenting) ("Because IDEA was enacted pursuant to Congress' spending power, our analysis of the statute in this case is governed by special rules of construction.") (internal citation omitted); *Rowley*, 458 U.S. at 204 n.26 (rejecting argument that Congress could have intended that States maximize each child's

potential because it "has not done so unambiguously, as required in the valid exercise of its spending power").[14] The additional conditions that Petitioners seek to have the Court impose upon the States must accordingly be viewed through the Spending Clause lens, and the "cooperative federalism" model that is the backbone of IDEA, *Schaffer*, 126 S. Ct. at 531, must be honored.

A. Congress Must Provide "Clear Notice" to the States Before Subjecting Them to Conditions, Obligations, or Liabilities

1. In *Arlington*, this Court considered whether expert fees could be recovered as costs under IDEA. This Court began by noting that "Congress enacted the IDEA pursuant to the Spending Clause," which means that "when Congress attaches conditions to a State's acceptance of federal funds, the conditions must be set out 'unambiguously.'" *Arlington*, 126 S. Ct. at 2458-59. "In other words, we must ask whether the IDEA furnishes clear notice regarding the liability at issue in this case." *Id.* at 2459.

This analysis flows inexorably from the contractual nature of Spending Clause rights and obligations: "Legislation enacted pursuant to the spending power is much in the nature of a contract, and therefore, to be bound by federally imposed conditions, recipients of federal funds must accept them

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[14] Respondent acknowledges that the Spending Clause was not specifically raised below, but there is no impediment to this Court considering this issue. First, in *Arlington* itself, the Spending Clause had been neither raised nor decided below. Case No. 05-18, Res. Br. at 48; Pet. Reply Br. at 12-13. Second, at the time Respondent here moved to dismiss the appeal, the Sixth Circuit was bound by *Cavanaugh*; thus, the outcome was already dictated by binding precedent. Pet. App. 1a-2a. Third, at the time of the motion to dismiss, *Arlington*, which clarified the interplay between IDEA and the Spending Clause, had not yet been decided. Finally, Petitioners addressed this matter in their brief, and thus anticipated it as an issue properly before the Court. Pet. Br. at 15-16 n.10; SG Br. at 11 n.4.

voluntarily and knowingly." *Arlington*, 126 S. Ct. at 2459 (*quoting in part Pennhurst*, 451 U.S. at 17 (internal quotation marks omitted)).

Surveying the language of IDEA, this Court in *Arlington* found no statutory mandate that States could be responsible for expert costs: "Certainly the terms of the IDEA fail to provide the clear notice that would be needed to attach such a condition to a State's receipt of IDEA funds." *Arlington*, 126 S. Ct. at 2461. This Court reached that conclusion notwithstanding the fact that the legislative history on this point provided that the "conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses. . . ." *Id.* at 2463 (quoting H.R. Conf. Rep. No. 99-687, at 5). In other words, a clear statement in legislative history cannot substitute for a clear statement in the statute that the States will be bound to adhere to certain conditions: "In a Spending Clause case, the key is not what a majority of the Members of both Houses intend but what the States are clearly told regarding the conditions that go along with the acceptance of those funds." *Id.* Petitioners' position that that this Court has not held that "the Spending Clause is an independent interpretive lens through which to read a statute" thus runs afoul of this Court's teachings in *Arlington*. Pet. Br. at 15-16 n.10.

2. To avoid the "clear notice" requirement, Petitioners insist that this case does not implicate the Spending Clause at all because a "parent's right to sue *pro se* for an IDEA violation derives from 28 U.S.C. 1654, which is not Spending Clause legislation." Pet. Br. at 15 n.10; *see also* SG Br. at 11 n.4. But Petitioners are not seeking relief under Section 1654, which provides nothing more than "parties may plead and conduct their own cases personally or by counsel. . . ." Instead, they are asking this Court to grant them substantive rights and relief under IDEA, as well as to recognize a private right of action. *See, e.g.*, Pet. Br. at 31 ("[P]arents also have a substantive right

under IDEA to a *free* appropriate public education for their child."); Pet. Br. at 12 (Congress "provid[ed] parents with their own right of action" in IDEA). In fact, Section 1654 precludes parents from representing their child *pro se* (see Part I, *supra*), leaving Petitioners to claim that IDEA carves an exception to the statute. Therefore, Petitioners cannot circumvent the Spending Clause by pointing to Section 1654.

3. The Third Circuit in *Collinsgru* appropriately analogized the request for recognition of joint substantive rights to a request to recognize an implied right of action. *See Collinsgru*, 161 F.3d at 233. The court then searched – in vain – for clear evidence in either the statute or legislative history that Congress intended to imply a cause of action for parents to remedy substantive violations of IDEA.

Particularly in Spending Clause cases, this Court has exhibited reluctance to allow implied rights of action. *See, e.g., Gonzaga Univ. v. Doe*, 536 U.S. 273, 280 (2002) (requiring Congress to "speak[] with a clear voice" and "manifest[] an 'unambiguous' intent to confer individual rights"); *id.* at 281 ("Our more recent decisions, however, have rejected attempts to infer enforceable rights from Spending Clause statutes."). And even "where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private *right* but also a private *remedy*.'" *Id.* at 284 (*quoting Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added by *Gonzaga*)). IDEA contains no "clear" or "unambiguous" directive that parents have a right of action to vindicate their child's rights, which is hardly surprising in light of IDEA's design.

B. Petitioners' Proposed Rule Would Inflict Conditions, Obligations, and Liabilities for which States Did Not Receive Clear Notice

1. Far from imposing an unambiguous directive to further laden States with litigation costs, this Court recognized in *Schaffer* that Congress endeavored to *lessen* this burden: "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs." *Schaffer*, 126 S. Ct. at 535. It is beyond peradventure that "a great deal is already spent on the administration of the Act. Litigating a due process complaint is an expensive affair, costing schools approximately $8,000-to-$12,000 per hearing." *Id.* Once the case reaches the judicial arena, the litigation costs for school districts soar upwards. *See, e.g.*, NSBA Br. at 25-27; Council Br. at 11-12.

Moreover, as explained above, Congress placed the States on notice that attorneys were not required at the administrative hearing level. 20 U.S.C. § 1415(h)(2). The corresponding failure to specify that parents could either represent their child *pro se* in court or pursue their own substantive rights independent of the rights of their child accordingly assumes significance as this Court recognized in *Arlington*: "[T]he Act contains detailed provisions that are designed to ensure that such [attorney fee] awards are indeed reasonable. The absence of any comparable provisions relating to expert fees strongly suggests that recovery of expert fees is not authorized." *Arlington*, 126 S. Ct. at 2460 (internal citation omitted).

2. The First Circuit in *Maroni* candidly acknowledged that the rule it adopted – and the rule Petitioners urge this Court to adopt – raised "real" "concern[s]" on the part of school districts, which feared that "permitting parents to proceed pro se will mean more meritless IDEA suits will be brought, requiring school districts to hire counsel and placing a considerable burden on their already stretched budgets." *Maroni*, 346 F.3d at

251. A few pages later, it reiterated this point: "Pro se litigants also impose unusual burdens on courts, and there is a desire to save courts and school districts from 'poorly drafted, inarticulate, or vexatious claims.'" *Id.* at 258; *see also Jones v. Niagara Frontier Transp. Auth.*, 722 F.2d 20, 22 (2d Cir. 1983) ("[T]he conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents but as well for his adversaries and the court."); SG Br. at 9 (acknowledging that "permitting parents to proceed *pro se* could increase the amount of meritless IDEA litigation").

This case amply illustrates the concerns expressed by the First Circuit. When Petitioners proceeded without counsel, Respondent had to fend off a barrage of meritless (and often procedurally improper) motions that inflicted considerable costs upon it. For example, in the interlocutory appeal to the Sixth Circuit case (Case No. 04-4159), Petitioners filed a *pro se* "Emergency Motion for an Injunction Pending Appeal" without requesting a stay from the district court, followed shortly thereafter by an "Emergency Motion for a Temporary Injunction Pending Adjudication of Request for Permanent Injunction." Neither motion complied with Sixth Circuit procedures, which prompted the Sixth Circuit to fault Petitioners' noncompliance with these procedures in denying these requests. (Case No. 04-4159, Sixth Circuit Order dated Nov. 4, 2004). In the meantime, however, Respondent incurred substantial attorneys' fees in opposing such meritless filings.

Similarly, before the district court, Petitioners sought sanctions *pro se* under FED. R. CIV. P. 11 against Respondent's counsel for "perpetrat[ing] a fraud upon" the court in connection with some affidavits that Respondent filed. (Doc. No. 15). Petitioners neglected to comply with the safe harbor provision of Rule 11, however, prompting the court to deny the motion for failing to adhere to the "procedural mandates" of Rule 11. (Doc. No. 34). The court further noted that even

compliance with the procedural requirements would not have obtained a different result because Petitioners' "subjective[] disagree[ment]" with facts contained in an affidavit falls well below the threshold for Rule 11 sanctions.

After judgment below, Petitioners filed a *pro se* motion for relief from judgment under FED. R. CIV. P. 60(b) premised on their belief that hearing officer failed to include certain documents in the administrative record. (Doc. No. 43, filed July 25, 2005). Apparently, Petitioners had not checked the court's files before filing such a motion, because the documents were contained in the record. (Doc. Nos. 45 and 46). As the court explained in denying relief, "the Court staff personally checked the administrative record on file with the Clerk of Courts. . . and confirmed that the administrative record does, in fact, include the Plaintiffs' post-hearing brief and exhibits filed with the initial hearing officer." (Doc. No. 46, Order entered Aug. 8, 2005). Respondent also had to incur the time and expense of validating the record and drafting an opposition to what essentially was a frivolous motion. (Doc. No. 45). The penchant for *pro se* litigators to seize on an idea and serve a pleading without verifying the facts or law is well-chronicled. Council Br. at 15-17, 21-22. Such actions are not mere annoyances; they waste the scarce resources of school districts and the judiciary.

Aside from defending *pro se* litigation, extending the full slate of substantive rights under IDEA to an entirely new class of beneficiaries will inevitably saddle States and their school districts with conditions to which they did not agree under the statute. The statute, after all, was designed to protect "Individuals with Disabilities." Petitioners would inject "parent" in the myriad places where Congress spoke of a *child's* right to a FAPE. Such revisionism alters the entire focus of the statute and reshapes how special education services are provided under IDEA while the child gets lost in the balance.

As written, the statute focuses efforts on how to best meet the "needs of the child." 20 U.S.C. § 1414(d)(3)(A)(iv); *see also id.* at § 1414(d)(1)(A)(i)(II); 34 C.F.R. § 300.321(b)(2) ("If the child does not attend the IEP Team meeting, the public agency must take other steps to ensure that the child's preferences and interests are considered."). Petitioners invite this Court to instead render the States beholden to the "interests" and "needs" of the parents.

It must also be remembered that a consequence of agreeing to accept federal funds through IDEA involves the State waiving its sovereign immunity otherwise guaranteed by the Eleventh Amendment and ceding some control over its educational prerogatives as ensured by the Tenth Amendment. U.S. CONST. amend. X, XI. *See, e.g., Virginia v. Riley,* 106 F.3d 559, 570-71 (4th Cir. 1997) (recognizing that educational choices are "peculiarly within their powers as sovereign States" and that if Congress desires to infringe on that terrain, "it must at least do so affirmatively and unambiguously") (panel dissent of Luttig, J., adopted by en banc court as majority opinion); *M.A. v. State-Operated Sch. Dist. of the City of Newark*, 344 F.3d 335, 347 (3d Cir. 2003) ("Taken together, §§ 1403 and 1415 embody a clear and unambiguous expression of Congress's intent to condition a state's participation in the IDEA on the state's waiver of Eleventh Amendment immunity from suit in federal court."). The States, without clear notice, would have thus forsaken immunity from suits by an entirely new category of plaintiffs and relinquished even greater control over educational policy than they believed.

3. The fact that IDEA funds generally should not be used to pay attorneys' fees or costs does not negate the Spending Clause, as Petitioners suggest, or *Arlington* would have been decided differently. Pet. Br. at 15 n.10, *citing* 34 C.F.R. 300.517(b)(1). Since the issue in *Arlington* was whether certain fees were recoverable as costs, it would have been easily

resolved if the answer were that IDEA simply does not provide funds for such matters. Yet that is not what this Court held; it instead applied the Spending Clause regardless of the argument now advanced by Petitioners.

In fact, the failure of Congress to provide adequate funding only heightens the relevance of the "clear notice" requirement. States must have clear notice of all of their obligations and conditions under Spending Clause legislation so that they can perform their own calculus as to whether to accept the deal. If Congress is not providing funding for certain aspects of a program, it is all the more important that States be fully apprised of the unfunded mandate accompanying the bargain.

4. Congress certainly knew how to provide clear notice to the States that they would be subjected to defending *pro se* actions by parents on substantive grounds – it spelled the notice out in the legislative proposal in 2004 that passed the Senate but was rejected by Congress as a whole: "a parent of a child with a disability may represent the child in any action under [IDEA] in Federal or State court, without the assistance of an attorney." 150 Cong. Rec. S5430 (daily ed. May 13, 2004).[15] This case presents one of the most compelling examples of the absence of clear notice in light of the fact that Congress rejected this specific proposal and knew that the federal courts had disavowed the underlying legal theory as well.

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[15] Petitioners make a few passing references to the legislative history, Pet. Br. at 19, but uncover nothing as pertinent as the history surrounding the 2004 failed amendment. It must also be remembered that this Court in *Arlington* rejected unequivocal legislative history in the face of statutory language that simply did not incorporate the concepts embodied in the history. *See Arlington*, 126 S. Ct. at 2463 ("Whatever weight this legislative history would merit in another context, it is not sufficient here."); *id.* at 2465 (Ginsburg, J., concurring) ("[W]e are not at liberty to rewrite 'the statutory text adopted by both Houses of Congress and submitted to the President,' to add several words Congress wisely might have included.") (internal citation omitted).

The circuit lineup on this issue is further testament to the fact that no clear notice of these conditions appears in IDEA. Six circuits – the Second, Third, Fourth, Sixth, Seventh, and Eleventh – held that parents could not proceed *pro se* on behalf of their child or that they lacked substantive rights against only one circuit (the First) on the other side. *See Mosely v. Board of Educ. of City of Chicago*, 434 F.3d 527 (7th Cir. 2006); *Cavanaugh v. Cardinal Local Sch. Dist.*, 409 F.3d 753 (6th Cir. 2005); *Doe v. Board of Educ. of Baltimore County*, 165 F.3d 260, 263 (4th Cir. 1998); *Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Wenger v. Canastota Cent. Sch. Dist.*, 146 F.3d 123 (2d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997); *but see Maroni v. Pemi-Baker Regional Sch. Dist.*, 346 F.3d 247 (1st Cir. 2003). If the language were so clear as to provide requisite notice to "a state official who is engaged in the process of deciding whether the State should accept IDEA funds," *Arlington*, 126 S. Ct. at 2459, one would not have expected so many federal circuit judges to go astray. *See, e.g., Pennhurst*, 451 U.S. at 25 (finding that it "strains credulity" that States would have known of their obligations under a Spending Clause statute when federal agency "never understood" statutory provision "to impose conditions on participating States").

In fact, Judge Roth, dissenting in *Collinsgru*, openly recognized that "the Act is silent with regard to the nature of the role of parents during federal court proceedings under the Act. Thus, *it is not clear* from the language of the Act whether parents are 'aggrieved parties' able to bring a court action on their own behalf, or whether the right to appeal belongs solely to their child or belongs to both parents and child." *Collinsgru*, 161 F.3d at 238 (Roth, J., dissenting) (emphasis added). This recognized silence and lack of clarity cannot provide the "clear notice" required under the Spending Clause.

CONCLUSION

For the foregoing reasons, the judgment of the Sixth Circuit should be affirmed.

Respectfully submitted,

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January 23, 2007

APPENDIX

JEFF AND SANDEE WINKELMAN
1853 Jacqueline Dr.
Parma, OH 44134
440-842-6547
jswinky@yahoo.com

June 2, 2003

SUPERINTENDENT
Dr. Kurt Stanic
Parma City Schools
6726 Ridge Rd.
Parma, Ohio 44129

Office for Exceptional Children
Procedural Safeguards
Ohio Dept. of Education
25 S. Front St., 2nd Floor
Columbus, OH 43215-4104

Dear Dr. Stanic,

We are the parents of Jacob Winkelman, who is in the Autistic Pre-School Program at Achievement Centers East.

I am requesting an impartial due process hearing in order to challenge the Parma City School district, Cuyahoga County, to provide a free, appropriate, public education for my child, Jacob Winkelman, who has a disability.

Parma City Schools do not have a developed Autistic Program that provides the needed intervention and support for my child, Jacob Winkelman. I am in disagreement with the placement currently being offered as a continuum to the current classroom at Achievement Centers. I feel the school is not providing my child with a free, appropriate, public education. My child is not being permitted to be in his least restrictive environment.

The only possible resolution to this matter is to place Jacob in a Specialized Autistic program.

Please provide me with a list of free or low cost legal assistance that I could contact.

Thank you for your attention to my request. I may be reached at 440-842-6547.

Sincerely,

Jeff and Sandee Winkelman

cc: Kevin Kelley, President
Dr. Judith Hudgins, hand delivered
Achievement Centers, hand delivered
Office for Exceptional Children, Procedural Safeguards, Certified Mail

The Individuals with Disabilities in Education Act, 20 U.S.C. 1400 et seq., provides in pertinent part:

§ 1400. Congressional statements and declarations

* * * * *

(c) Findings

Congress finds the following:

(1) Disability is a natural part of the human experience and in no way diminishes the right of individuals to participate in or contribute to society. Improving educational results for children with disabilities is an essential element of our national policy of ensuring equality of opportunity, full participation, independent living, and economic self-sufficiency for individuals with disabilities.

* * * * *

§ 1401. Definitions

* * * * *

(23) Parent

The term "parent" means –

(A) a natural, adoptive, or foster parent of a child (unless a foster parent is prohibited by State law from serving as a parent);

(B) a guardian (but not the State if the child is a ward of the State);

(C) an individual acting in the place of a natural or adoptive parent (including a grandparent, stepparent, or other relative) with whom the child lives, or an individual who is legally responsible for the child's welfare; or

(D) except as used in sections 1415(b)(2) of this title and 1439(a)(5) of this title, an individual assigned under either of those sections to be a surrogate parent.

* * * * *

§ 1406. Requirements for prescribing regulations

* * * * *

(b) Protections provided to children

The Secretary may not implement, or publish in final form, any regulation prescribed pursuant to this chapter that –

* * * * *

(2) procedurally or substantively lessens the protections provided to children with disabilities under this chapter, as embodied in regulations in effect on July 20, 1983 (particularly as such protections related to parental consent to initial evaluation or initial placement in special education, least restrictive environment, related services, timelines, attendance of evaluation personnel at individualized education program meetings, or qualifications of personnel), except to the extent that such regulation reflects the clear and unequivocal intent of Congress in legislation.

* * * * *

§ 1411. Authorization; allotment; use of funds; authorization of appropriations

(a) Grants to States

(1) Purpose of grants

The Secretary shall make grants to States, outlying areas, and freely associated States, and provide funds to the Secretary of the Interior, to assist them to provide special education and related services to children with disabilities in accordance with this subchapter.

* * * * *

(e) State-level activities

* * * * *

(3) Local educational agency risk pool

* * * * *

(E) Legal Fees

The disbursements under subparagraph (D) shall not support legal fees, court costs, or other costs associated with a cause of action brought on behalf of a child with a disability to ensure a free appropriate public education for such child.

(F) Assurance of a free appropriate public education

Nothing in this paragraph shall be construed –

(i) to limit or condition the right of a child with a disability who is assisted under this subchapter to receive a free appropriate public education pursuant to section 1412(a)(1) of this title in the least restrictive environment pursuant to section 1412(a)(5) of this title;

* * * * *

§ 1412. State eligibility

(a) In general

A State is eligible for assistance under this subchapter for a fiscal year if the State submits a plan that provides assurances to the Secretary that the State has in effect policies and procedures to ensure that the State meets each of the following conditions:

(1) Free appropriate public education

(A) In general

A free appropriate public education is available to all children with disabilities residing in the State between the ages of 3 and 21, inclusive, including children with disabilities who have been suspended or expelled from school.

(B) Limitation

The obligation to make a free appropriate public education available to all children with disabilities does not apply with respect to children –

* * * * *

(3) Child find

(A) In general -

All children with disabilities residing in the State, including children with disabilities who are homeless children or are wards of the State and children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.

* * * * *

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

* * * * *

(B) Additional requirement

(i) In general

A State funding mechanism shall not result in placements that violate the requirements of subparagraph (A), and a State shall not use a funding mechanism by which the State distributes funds on the basis of the type of setting in which a child is served that will result in the failure to provide a child with a disability a free appropriate public education according to the unique needs of the child as described in the child's IEP.

* * * * *

(6) Procedural safeguards

(A) In general

Children with disabilities and their parents are afforded the procedural safeguards required by section 1415 of this title.

* * * * *

(11) State educational agency responsible for general supervision

* * * * *

(B) Limitation

Subparagraph (A) shall not limit the responsibility of agencies in the State other than the State educational agency to provide, or pay for some or all of the costs of, a free appropriate public education for any child with a disability in the State.

* * * * *

(12) Obligations related to and methods of ensuring services

(A) Establishing responsibility for services

The Chief Executive Officer of a State or designee of the officer shall ensure that an interagency agreement or other mechanism for interagency coordination is in effect between each public agency described in subparagraph (B) and the State educational agency, in order to ensure that all services described in subparagraph (B)(i) that are needed to ensure a free appropriate public education are provided, including the provision of such services during the pendency of any dispute under clause (iii). Such agreement or mechanism shall include the following:

(i) Agency financial responsibility

An identification of, or a method for defining, the financial responsibility of each agency for providing services described in subparagraph (B)(i) to ensure a free appropriate pubic education to children with disabilities, provided that the financial responsibility of each public agency described in subparagraph (B), including the State medicaid agency and other public insurers of children with disabilities, shall precede the financial responsibility of the local educational agency (or the State agency responsible for developing the child's IEP).

* * * * *

§ 1414. Evaluations, eligibility determinations, individualized education programs, and educational placements

(a) Evaluations, parental consent, and reevaluations

(1) Initial evaluations

* * * * *

(D) Parental consent

(i) In general

* * * * *

(II) Consent for services

An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.

* * * * *

(d) Individualized education programs

(1) Definitions

In this chapter:

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes –

* * * * *

(II) a statement of measurable annual goals, including academic and functional goals, designed to –

* * * * *

(VIII) beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter –

* * * * *

(cc) beginning not later than 1 year before the child reaches the age of majority under State law, a statement that the child has been informed of the child's rights under this chapter, if any, that will transfer to the child on reaching the age of majority under section 1415(m) of this title.

* * * * *

§ 1415. Procedural safeguards

* * * * *

(b) Types of procedures

The procedures required by this section shall include the following:

* * * * *

(7)(A) Procedures that require either party, or the attorney representing a party, to provide due process complaint notice in accordance with subsection (c)(2) of this section (which shall remain confidential) –

(i) to the other party, in the complaint filed under paragraph (6), and forward a copy of such notice to the State educational agency; and

(ii) that shall include –

(I) the name of the child, the address of the residence of the child (or available contact information in the case of a homeless child), and the name of the school the child is attending;

(II) in the case of a homeless child or youth (within the meaning of section 11434a(2) of Title 42, available contact information for the child and the name of the school the child is attending;

(III) a description of the nature of the problem of the child relating to such proposed initiation or change, including facts relating to such problem; and

(IV) a proposed resolution of the problem to the extent known and available to the party at the time.

(B) A requirement that a party may not have a due process hearing until the party, or the attorney representing the party, files a notice that meets the requirements of subparagraph (A)(ii).

* * * * *

(e) Mediation

(1) In general

Any State educational agency or local educational agency that receives assistance under the subchapter shall ensure that procedures are established and implemented to allow parties to disputes involving any matter, including matters arising prior to the filing of a complaint pursuant to subsection (b)(6) of this section, to resolve such disputes through a mediation process.

* * * * *

(m) Transfer of parental rights at age of majority

(1) In general

A State that receives amounts from a grant under this subchapter may provide that, when a child with a disability reaches the age of majority under State law (except for a child with a disability who has been determined to be incompetent under State law) –

(A) the agency shall provide any notice required by this section to both the individual and the parents;

(B) all other rights accorded to parents under this subchapter transfer to the child;

(C) the agency shall notify the individual and the parents of the transfer of rights; and

(D) all rights accorded to parents under this subchapter transfer to children who are incarcerated in an adult or juvenile Federal, State, or local correctional institution.

(2) Special rule

If, under State law, a child with a disability who has reached the age of majority under State law, who has not been determined to be incompetent, but who is determined not to have the ability to provide informed consent with respect to the educational program of the child, the State shall establish procedures for appointing the parent of the child, or if the parent is not available, another appropriate individual, to represent the educational interests of the child throughout the period of eligibility of the child under this subchapter.

* * * * *